No. 13673

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al.,

Appellees.

Appeal from a Judgment of the United States District Court for the District of Oregon.

JAMES ALGER FEE, Judge.

PETERSON & POZZI
901 Loyalty Building
Portland 4, Oregon

Attorneys for Appellees
Martin E. Aden, et al.

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STEVENS-NESS LAW PUB. CO.

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SUPPLEMENTARY STATEMENT OF THE CASE

Appellant's Statement of the Case, although presented at great length, does not include a fair statement of the theory upon which the appellant presented its case to the Court below nor does it fairly state the theory of the case

there presented by appellees. Since the appellees and the unions joined in the defense of the case in the Court below, appellees herein adopt the Statement of the Case in the Opening Brief filed on behalf of the appellant unions at pages 6 to 9. Because the main contention made by the individual appellees is that the Court below presented the case against them, as requested by and without the objection of, appellant, a complete statement of the case and the questions involved will be made in connection with the argument presented by appellees.

SUMMARY OF ARGUMENT

The gist of appellant's contentions in its brief is that the Court, by its instructions, failed to permit the jury to find that an individual was liable for the damage which he, himself, may have committed, even though the jury found that there was no conspiracy or concerted action, as defined by the Court. (Appt. Br. 48) Appellees are in agreement that this was the effect of the instructions of the Court. Appellees submit, however, that insofar as the appellant's brief attempts to convey the impression that appellant presented its case on any theory under which it sought the assessment of damages against an individual for his own wrongful act, it is grossly misleading. On the contrary, it was the appellees who argued that provision should have been made for the assessment of damages as against each individual for his own wrongful acts in the event that the jury found that there was no concerted action. The Court, at the urging of and with no protest from appellant, submitted the case against the individuals

on the basis all of the individual participants were liable for the full amount of damages, if any.

If there was any error, therefore, in the instructions of the court, it was error invited by the appellant by the manner in which their case was presented in the complaint and pre-trial order, in the statements of its counsel to the court at various times during the trial, and its failure to object to the rulings of the court which indicated clearly the court's position incorporated in its instructions.

The objections taken by the appellant to the instructions of the court and to the failure of the court to give instructions, which it requested, are not pertinent to the error which it now, for the first time, claims that the court committed, and were not sufficient to advise the trial court of the contentions which it now makes. The jury was instructed in a manner consistent with appellant's claims and would have been entitled to bring in a verdict against appellees, had it adopted appellant's contentions.

If any element of prejudice existed in the case, it was brought about solely by appellant's attempt to present its case in a manner which would be most conducive to the appearance of prejudice by joining the assault and battery cases and by failing to give the jury an opportunity to find an individual liable for the damages which he, himself, might have caused, by virtue of which appellant believed that the amount of its total recovery would be enhanced.

Appellant's complaint, amended complaint, and contentions made in its pre-trial order did not state a claim

for relief against the individual appellees because of appellant's reliance upon the standards of the Labor Management Relations Act of 1947, which have been held to create no liability on the part of other than labor organizations, either under the Act, or at common law.

If appellant were entitled to a new trial, it has, by its own choice, so intermingled its claims against the unions and against appellees that it would be extremely prejudicial to appellees for a partial new trial to be granted as to them alone.

ARGUMENT

I

Appellant's theory of the case was adopted by the court and it cannot now complain because the results were not as anticipated.

A good deal of confusion apparent in a comparison between appellant's brief and the position it took during the trial derives from the ambiguity of the term "individuals". It will be demonstrated that throughout the course of the proceedings the appellant used the term "the individuals" as a collective noun, referring to a group, which it alleged had participated in concerted action, and that all of the members were liable for all of the damages sustained by Pineapple, and this construction was adopted by the Court.

The other construction of the term "individuals", which was urged by appellees, is as a term of reference to a number of discrete entities, each of whom might be held responsible for damage caused by his own acts in the event

the jury failed to find the existence of concerted action sufficient to make each responsible for the acts of others.

Appellant now attempts to take the position that the latter construction was one which it had in mind during the trial and which was rejected by the court. Thus it has, as will be shown, attempted to pick portions out of context of the record as a whole to bolster its claim in this regard and completely ignored the statements made by its counsel during the course of the proceedings which made it quite clear that the position which it then urged was adopted by the court. It is only by reference to the record and a point by point analysis of the manner in which the case was presented by the appellant that the Court's opinion denying appellant's motion for partial new trial can be fully appreciated.

An examination of the pleadings and pre-trial order leaves no doubt that appellant's tactics were directed towards a verdict in its favor insofar as the individuals are concerned, by virtue of alleged conspiratorial violations of the strictures of Section 303 of the Labor Management Relations Act, 29 U.S.C.A., Sec. 187 (Appt. Br. 3).

The complaint originally filed in the case states in paragraph I that the action arises under that Act and, since there was no allegation of diversity of citizenship, it must be assumed that appellant's theory at that time was that the individuals were responsible under the Act itself. (Tr. 3) This complaint was filed in December, 1949, and in July, 1951, an amended complaint was filed in which the allegation of jurisdiction based upon diversity of citizenship and amount was contained. The first count

of the amended complaint seeks a recovery against all defendants without any allegation as to a violation of the Act (Tr. 30 to 44). The second count alleges that the action arises under the Act and realleges each and every allegation in the first count, except that of diversity of citizenship and jurisdictional amount. The third count is based upon the Act and alleges damages created by virtue of a jurisdictional dispute.

The individuals are named defendants under each of the three counts and the only difference between the first and second counts is that there is an allegation of diversity of citizenship and jurisdictional amount in the first count, which is replaced in the second count by an allegation that the action is based upon violations of the Act. The allegations of fact which are used by appellant upon which to base liability under the Act are exactly the same as those upon which it seeks to base liability by virtue of the existence of diversity of citizenship. It is clear that the allegations of this portion of the complaint, if true, constitute a violation of Section 303 (a) (1) of the Act.

It is further clear then, from the pleadings, that the amended complaint was based upon a theory that the individuals might be held liable for conspiratorial violations of the Act at common law, provided that the Court had jurisdiction by virtue of diversity of citizenship and jurisdictional amount.

An examination of the pre-trial order discloses that the nature of the proceedings are stated to be as follows:

> "This is an action by the plaintiff to recover damages for injuries to its business and property which

> it claims to have sustained by reason of the activities of the defendants in boycotting and preventing the delivery of a cargo of pineapple which the plaintiff was shipping from Honolulu, Territory of Hawaii, to processors of fresh fruits in California." (Tr. 54)

No distinction is here made between the activities of the various defendants or their responsibility in connection therewith. Again, in the main contention as to the activities causing the damage, no distinction is made as to the activities or responsibility as between the respective defendants (Tr. 57 to 60). It may be seen from these contentions that the activities of the respective defendants are indistinguishable as are their objectives and purposes.

There is no contention made in the pre-trial order that any given individual is liable for any given amount of damages, nor is there any contention that any portion of the damages might be assigned to any named individual defendant to the exclusion of others or in a different amount than that of any other. The issues made up by the parties simply do not provide for the assessment of any damages on any basis other than the responsibility of one participant for the acts of all.

The question of whether or not there was a conspiracy to injure the plaintiff was raised by contention 18 (Tr. 68), but all of the questions, with respect to the amount of damages, are based upon the finding of the conspiracy as alleged by the plaintiff and not upon any non-existent contention that the individuals could be subject to liability other than by virtue of a conspiracy.

An example of what has been heretofore denominated as the collective usage of the term "individuals" is demonstrated by issue No. 8 (Tr. 67) taken in context:

> "(6) Did the International engage in the acts and conduct alleged by plaintiff?
>
> (7) Did Local 8 engage in the acts and conduct alleged by plaintiff?
>
> (8) Did the individual defendants engage in the acts and conduct alleged by plaintiff?
>
> (9) If so, did the alleged acts and conduct cause the consequences claimed by plaintiff?
>
> (10) If so, were such acts and conduct the proximate cause of damages alleged to have been sustained by plaintiff?
>
> (11) If so, what was the amount of the damages that plaintiff allegedly sustained?" (Tr. 66, 67)

If these issues were meant, as claimed by appellant in its brief, to provide for damages other than by way of an award of one sum, as against all participants, it would have been easy enough for appellant to so provide by making an issue thereof.

Another clear example of appellant's intention to lump all of the defendants and damages together is contained in the following issues:

> "(22) (a) Did the defendants engage in a combination and conspiracy to boycott plaintiff's cargo and to injure its business, etc. and engage in various acts and conducts in furtherance thereof as alleged by plaintiff?
>
> (b) Did the defendants engage in a combination and conspiracy to violate Section 303 (a) (1) of the Labor Management Relations Act in the manner complained of by the plaintiff?
>
> (c) Did the defendants engage in a combination and conspiracy to violate Section 303 (a) (4) of the Labor Management Relations Act in the man-

ner complained of by the plaintiff?

(23) If so, did the alleged combination and conspiracy and the acts and conduct in furtherance thereof cause injuries to plaintiff's business and property?" (Tr. 63, 69)

That appellant's position at the trial was different from that which it takes in its brief is most clearly shown by the various statements made by its counsel in discussions with the court.

It was appellant's position that the assault and battery cases were on a different footing from the instant case and speaking with reference to those cases Mr. Krause said:

> "The mere fact that they were in The Dalles is not going to be enough except with respect to those that were on the dock, possibly. It could be inferred from the fact that they were on the dock that they were lending aid or assistance to those that were engaged in damaging our equipment. *But as to the damage to our business, the entire matter arises out of the conspiracy among the individuals and among the unions to picket our operation.*" (emphasis ours) (Tr. 924)

This position was reiterated at a later time and the court, in apparent agreement with Mr. Krause, stated:

> "The assault cases depend on entirely different principles than the other.
>
> * * * * *
>
> "Mr. Andersen: I thought that counsel was referring to the men in the assault cases that he intended to hold because they were in The Dalles. I misunderstood him on that point, your Honor.
>
> The Court: My point is that if they find this congregation of men on the dock was gathered for

> an unlawful purpose and that they invaded the dock that way, everybody could be held. That is my theory of it. Certainly anybody that aided or abetted or counseled them there could be held." (Tr. 1405)

The best illustration of this point occurred at the time of the submission of the forms of verdict by the appellant. Appellant submitted three forms of verdict for plaintiff to the court. One was to be used in the event the jury found in favor of the plaintiff and against all of the defendants and provided one blank space for the assessment of damages.

A second contained the names of all of the defendants and provided for the assessment of one sum as damages. This was the verdict actually given by the court (Tr. 1467-8).

Appellant presented a third form which provided for the assessment of one sum as against the unions and another sum as against all the individuals who would be held. At this point the court inquired:

> "The Court: On what theory do you think that they could return a different type of verdict against the unions?
>
> Mr. Krause: Pardon me. I didn't hear.
>
> The Court: I say, on what theory do you think they could return a different type of verdict against the unions than the individuals?
>
> Mr. Krause: If they were to return a verdict against the individuals only for the damage attributable to the invasion of the dock and hold the unions for a larger period of time; that is, several days prior to that. I didn't know exactly how your Honor was going to instruct them on that, but it seemed to me conceivable that they might consider the damages

against the individuals on Wednesday, if the jury felt they were not in the conspiracy or in the picture earlier; and that the unions, of course, had begun this operation, if they did at all, on the 26th or earlier, and the company's damages were accruing daily. There is in the evidence the facts necessary to determine what the accruing damage was per day.

Personally, we would prefer to have it submitted to the jury on just one theory, but it seemed to us that there was a possibility that the jury might want to do that, and I think they could on the evidence. However, in our view of the case this was a conspiracy and every part was a part of that conspiracy. Under the law as we understand it a conspirator coming into the picture a few days later than another is not relieved of the damages that have accrued at the time he entered the conspiracy." (emphasis ours) (Tr. 1408, 1408A, 1408B)

The question might well be asked as to how the forms of verdict providing for only one assessment of damages as against all of the individuals squares with the claim that:

"It is fundamental that, even though Hapco failed in its proof of conspiracy, it was entitled to recover damages against such of the appellees as were shown to be guilty of tortious conduct resulting in damages to it." (Appt. Br. 48)

If this had been appellant's contention at the trial, it would have submitted a verdict form with a blank space for damages next to each of the names of the individual defendants. The court did just what appellant's counsel said he preferred.

To make this change of position by appellant even more ludicrous it is pertinent to note the request made

by counsel for appellees for the submission of a form of verdict which would,

> ". . . have given the jury an opportunity to assess damages against the various defendants in such an amount as the jury may properly find, if they think the evidence shows that certain individuals may have been more culpable than other of the individual defendants . . ." (Tr. 1410)

See also (Tr. 1463, 1464, 1484)

The court rejected this form because it allowed for allocation of damages and reiterated its intention to instruct on an all or nothing at all basis, and that if there were no conspiracy found that nobody would be liable, again without objection from appellant. (Tr. 1411-13)

II

The objections made by appellants to the instructions are insufficient for its present claim of error.

After the jury had been instructed, the appellant took the following exceptions:

> "Then the Plaintiff Hawaiian Pineapple Company will take an exception to the instruction that there can be no verdict against the individuals in that case unless the unions are also found liable, because there is a cause of action stated against them that was broader than a conspiracy to restrain trade, and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in. That was one of the counts under the original complaint, and it seems to me that they could bring in a verdict in the Hawaiian Pineapple Company case even though they did not bring one against the unions.
>
> Then my second point is the failure to instruct in the Hawaiian Pineapple Company case that the

plaintiff could recover against the individuals and/or unions on a theory other than the Taft-Hartley Act, because there was a diversity of citizenship and they engaged in physical activities that prevented us from carrying on our business which they were in no event, under any theory of labor dispute or anything else, entitled to engage in. We would be entitled to recover on (1741) that theory if there were no Taft-Hartley action involved here.

Those are the only things that we feel the Court has not covered." (Tr. 1450, 1451)

The instruction that there is no liability of the individuals unless the unions were liable, if erroneous, was made harmless to appellant by the verdict against the unions. It might be pointed out however, that the instructions on liability of the unions and individuals followed the pleadings and contentions made by appellant quite closely in a number of respects and that the allegations made by appellant invited the court to treat the question in the way in which it did. Compare the instructions given by the court (Tr. 1435-6) with the contentions in the pretrial order. (Tr. 57)

The only object and purpose ascribed to the activities of the individuals by appellant was that of "boycotting its business" (Tr. 187). The jury was instructed without objection by appellant, that if the sole object of the activities was to protect wages and working conditions then appellees would not be liable, *without objection by appellant.* (Tr. 1429) It is only on appeal that the position is taken that individuals could be held liable for damages even though their objects were other than those which appellant ascribed to them.

The second point made by appellant in its exception to the instructions is equally faulty. From the beginning of its instructions the court stated all of the contentions which were made by plaintiff in its pleadings and in its contentions in summary form (Tr. 1421, 1422). It included in these contentions the allegations as to the riot and the subsequent damage alleged to have been caused thereby. At the time of giving more specific instructions with respect to the liability of the individual, the court again sets forth the contentions made by plaintiff, and in a sweeping statement, it instructs the jury that a conspiracy may be found "if the evidence shows a concert of action between two or more persons to accomplish an unlawful purpose" (Tr. 1438).

The effect then of the court's instructions was to tell the jury that if they found the individual defendants engaged in concerted action to commit the unlawful acts alleged by the plaintiff and for the purposes to which plaintiff had alleged they had been committed, then they could hold the individual defendants liable. The complaint made by the appellant that the unions and the individuals should have been instructed on a theory other than the Taft-Hartley Act is of no merit, since the court did not use the Taft-Hartley Act for the purposes of its instructions, but merely the contentions of appellant. Appellant does not refer in taking its exceptions to any specific instructions which it requested the court to give. The appellant's exceptions are certainly not upon the grounds that the jury was not permitted to find damages as to any individual other than by virtue of a conspiracy which is the main claim in its brief.

The first requested instruction which appellant claims the court did not give and which is set forth in appellant's brief at page 32, is substantially the instruction given by the court (Tr. 1436, 1437), with the exception that the court used the word "conspiracy" rather than the term "riotous and tumultuous manner". But in view of the court's broad definition of a conspiracy as including any concerted action to effect the common purpose it cannot be maintained that the court's failure to raise a portion of its charge in the emotionally loaded words used by appellant, which mean the same thing, is erroneous.

The second requested instruction which appellant claims the court erred in failing to give (Tr. 32, 33), is inconsistent with the first instruction in that it leaves out the statement of the objects and purposes of the individuals, which the court believed to be important in view of the issues presented by appellant. Appellant cannot complain because the court chooses to give only one of two inconsistent instructions requested by it.

The third requested instruction (Tr. 33, 34) is the one which appellant relies on most heavily to support its claim in the brief that it had intended to allow the jury to pass directly upon the liability of each of the individual appellees, regardless of whether they were also engaged in a conspiracy (Tr. 44, 45). This instruction proceeds upon the theory that even if there were no conspiracy, the jury would be entitled to hold an individual participant responsible for all of the damages caused by other individuals. That is made evident by the second paragraph of the requested instructions where it appears that all of the

defendants would be liable for the largest sum as against any one defendant. If appellant's contention were correct that this instruction gives the opportunity for assessment of damages for each individual, then the damages would have been a total of the separate damages caused by each. Here again, appellant was attempting to avoid giving the jury the opportunity to make individual assessments for reasons best known to it.

The position of the court, in its opinion, that no exceptions were taken upon the ground of any mis-statement of the common law liability of the individuals may now be understood. Obviously, the court felt, as the record proves, that it had submitted the case generally on the grounds put forth by the appellant by virtue of which the jury was required to assess damages in a lump sum and the court did not feel that any exceptions had been taken or alternative proposed by the appellant whereby damages could have been assessed on an individual basis and, for this reason, believed that the objections and exceptions of appellant were insufficient (Tr. 165). Even if the court had felt that the issues had raised the question of recovery on an individual basis in the event of a finding of no conspiracy, it would certainly be surprised to find the appellant taking this position on appeal in view of the lengthy arguments made in its support by appellees at the trial, which it rejected. The law is clearly stated by Rule 51 of the Federal Rules of Civil Procedure which states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating*

distinctly the matter to which he objects and the grounds of his objection." (emphasis ours)

This rule has been taken in connection with Rule 46 of the Federal Rules of Civil Procedure which states:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes which an exception has heretofore been necessary it is sufficient that a party, at a time that the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefore; . . ."

There have been a number of cases decided by this Court which have stated in effect that these rules mean what they say and that Appellants are required to have laid a foundation in the court below for the assignments of error presented in this Court. See:

Bercut v. Park Benziger & Co., 150 F. 2d 731;
Christensen v. Troller, 171 F. 2d 66
Shevelin Hixon Co. v. Smith, 165 F. 2nd 170

III

Appellant made the conspiracy the gravamen of this action and may not now complain because the case was submitted on that basis.

There is no quarrel with the law that normally a charge of conspiracy is not the gravamen of a complaint. In the usual cause, even if a conspiracy is not proved, the plaintiff may still recover from such defendants as engaged in tortious conduct, causing damage to it, but this is not true of a case in which the parties by choice or by request make a finding in their favor dependent upon a

finding of conspiracy. Nor is it true in a case where the only recovery sought is for activities which would have been impossible but for concerted action on the part of the defendants. An annotation in 152 A.L.R. 1148 sets forth a number of cases where the action is such that the harmful effect results only through collective action and states:

> "An outstanding example of this class of case is illustrated by the collective power or pressure which results from group action, and which would be impossible or absent in the case of mere individual effect." 152 A.L.R. 1154

In *Landau v. Hostetter,* 266 Pa. 7, 109 A. 478 (1920) plaintiffs alleged a conspiracy by three defendants to evict them from leased premises. The court instructed the jury that unless they found a conspiracy there could be no recovery and defendant claimed error. In a brief decision the court stated:

> "The case was tried on the theory that the damage claimed by plaintiff resulted from the conspiracy.
>
> "They made it the ground of their action, and the learned trial judge did not err in instructing the jury that they could not find a verdict against but one of the defendants . . .
>
> "Here the conspiracy was the gravamen of the plaintiff's complaint. In view of the pleadings and the theory upon which the case was tried, the assignments of error are without merit."

The statements of counsel concurred in by the court which have been previously set forth show clearly that appellant regarded this case as being within the class mentioned by the annotator. The objects and results of the

activities of the appellees as alleged by appellant could not have arisen, according to appellant, but for the organization directed by the unions and appellant was seeking to recover for what it regarded as an organized boycott of its business. If appellant had been in court saying that X, Y and Z destroyed fifteen cases of pineapple by virtue of concerted action and requested the court to instruct that if they found that if there were no concerted action that X, Y and Z could still be held liable for the cases of pineapple which each of them may have destroyed, then the law cited by appellant would be applicable, but it cannot claim that the court was required on its own motion to submit the issue of damages caused by each individual merely because appellant was entitled to have such an issue submitted if it had so requested. The rule applicable here is stated as follows:

> "Where it is sought to recover damages for several tortious acts, each giving rise to a separate cause of action, the plaintiff should allege the amount of damage claimed on account of each cause of action; a general allegation of the damages arising from all of such acts and a finding in accordance therewith are prejudicial to the defendant." 15 Am. Jur., Damages, 751.

See also 53 Am. Jur. Trial 454, 488.

There is an unstated thread running through appellant's breif to the effect that the liability for a riot is something different from liability from a conspiracy to commit violent acts, as was charged by the court, which adds to the confusing picture painted in its brief. The authorities are in agreement that this distinction cannot be maintained by appellant. A case illustrating the point is the

one cited by the appellant (Appt. Br. 39), *Salem Manufacturing Company v. First American Fire Ins. Company of N. Y.,* 111 F. 2d 787, (1940). In that case this court examined the lengthy chain of decisions, all of which showed that to constitute a riot there must be in some way a premeditated concert of action for the purpose of accomplishing an objective agreed upon. The court quotes from Russell on Crimes as follows:

> ". . . But the violence and tumult must be in some way premeditated; for if a number of persons being met together at a fair, market, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray . . . But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous." 111 F. 2d at p. 802.
>
> " 'A tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself was lawful or unlawful'." *Walter v. Northern Insurance Company,* 370 Ill. 283, 18 N.W. 2d, 906, 121 A.L.R. 244, p. 248.

It may thus be seen that every riot contains the element of concert of action.

In defining conspiracy as being a concerted action, the court necessarily included a riot. The instruction requested by appellant, had it been given by the court, might well have led the jury to believe that merely be-

cause a man was a part of a group of which some of the members were involved in unlawful activities, that he might be held liable for all damages committed by any members of the group, even though there was no concert of action between them.

The one case cited by appellant in which a number of people were held liable for damages caused by mob violence, *Calcutt v. Gerig,* 271 Fed. 220 (Appt. Br. 39), is a case in which the court held that a conspiracy had been, in fact, proved and the damages as against all of the defendants were based on the finding of the conspiracy. It seems most pertinent that the court in that case specifically charged the jury that the plaintiff was bound to prove a conspiracy before he was entitled to recover.

Appellant has cited portions of the transcript which do not support its claim that under the court's instructions the jury would not have been able to bring in a verdict against the individuals unless they were found to have conspired with the unions. (Appt. Br. 43)

The Court at one point stated that:

> "If you find from the evidence that the individual defendants, *among themselves or together with* the defendants International and Local 8, or either of the unions conspired together . . . " (Tr. 1436) (emphasis added)

then the jury might find liability on the part of the individuals and the Court's instructions with respect to the individuals, read as a whole, would seem to indicate that if the jury found that the individuals had participated in

concerted action to do the proscribed acts, then liability might be found if one or more of the unions was also held to be liable, but that it was not necessary that the jury find that any individual had conspired with the unions, if the jury found that there was a conspiracy among the individuals, in order to predicate liability. However, at one point in instructing the jury, the Court stated:

> " . . . If on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will add to the verdict names of all the individual defendants against whom you find." (Tr. 1440)

Whether or not the jury did rely on this instruction does not seem, however, in view of the allegations made by the appellant as to the responsibility of each for the conduct of all to be an important matter, and, it should be noted that while exception was taken by appellant to the instructions by the Court which made it necessary for the jury to find one of the unions liable in order to find the individuals liable, no exception was taken to any instruction by which the jury was required to find that the individuals were engaged in a conspiracy with the unions in order to be held liable.

The matter further, insofar as it is raised by the appellant, seems also to be immaterial in view of the allegations made as to the objectives and purposes of both the unions and the individuals in engaging in this conduct. Under appellant's theory there would be no other way to account for the actions of the individuals unless

they were found to have been engaged in concerted action with the unions, and appellant did not take exception to the instruction that if the defendants were acting solely for the protection of their own wages and working conditions that they would be granted a verdict. (Tr. 1407, 1429)

IV

Congress, in enacting the Labor Management Relations Act, limited liability for violations thereof to "labor organizations", and individual members of offending labor organizations are not liable.

It has already been pointed out that the acts charged against the individual appellees were identical to those upon which appellant based its claim against the unions under Section 303 (a) (1) of the Labor Management Relations Act of 1947. The additional charges made under Section 303 (a) (4) were not submitted to the jury and no objection was made by the appellant to their being withdrawn.

The trial court evidently viewed the claim against the individuals as being one which was based upon the common law applying the standards set by the Taft-Hartley Act and instructed the jury under the common law, which it felt applicable. The court did not feel that the state law applied to this case. In its opinion the court stated:

> " 'It is true that the Court may not have accurately stated the elements of liability at *common law* as to the individuals. But no exceptions were taken to the instructions upon this ground. The subject is highly complicated and the question of wheth-

> er the state law or *a common law adopted by the federal enactments* applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the *common law*. This motion for new trial is therefore denied.' " (Tr. 165) (emphasis added)

In so stating, the court followed the theory propounded by the pleadings of appellant.

It is submitted by appellees that Congress, in considering the scope of damage actions arising out of labor disputes, specifically rejected an attempt to extend liability for violations of the Act beyond that of a labor organization so as to hold individual participants liable. The Act itself states:

> "(a) It shall be unlawful . . . for any *labor organization* to engage in . . . " (setting forth proscribed activities) Section 303, Labor Management Relations Act. (Emphasis supplied)

The Labor Management Relations Act was passed as a compromise version between separate bills submitted by the House and Senate. The original Senate Bill is contained in Senate Report 105, 80th Congress, First Session and the original House bill is contained in House Report 245, 80th Congress, First Session. Section 12 of the House bill made unlawful certain concerted activities including all of those now contained in the present Section 303 and was much broader in scope. After listing the unlawful concerted activities, the House bill provided that any person injured in his business, person or property by such proscribed activities could sue the person or persons responsible therefor in any district court of the

United States having jurisdiction of the parties and could recover damages. H.R. 245, at page 61.

The chairman of the House committee in commenting upon this Section states that for the acts of

> "violating collective bargaining contracts, violence in strikes, mass picketing, . . . for all these acts and others like them, unions and their members will be equally responsible with other persons under the law." H.R. 245, at page 8.

The original bill which was reported out by the Senate Committee did not contain section 303, but this was an amendment proposed by certain members of the Committee, including Senator Taft, which was adopted on the floor of the Senate. Senate Report 105, 80th Congress, First Session. Upon going to conference between the House and the Senate Committee, Section 12 of the House bill, which would have made members of unions liable for unlawful concerted activities, was stricken, and Section 303, in its present form, was adopted by the conference committee and passed by both Houses in that form.

The report of the conference committee is contained in Report No. 510 of the House-Senate Conference Committee and the report clearly shows that the provisions of Section 12 as to the liability of individual union members was rejected and that the Act as reported out of the conference committee would subject only labor organizations to suit for damages for violations of the provisions of the Act. See Conference Report No. 510, 80th Congress First Session, at pages 42, 58, 67. It is thus seen clearly that Congress rejected intentionally an attempt

to impose liability upon individual union members for violations of the provisions of the Act.

At no point in the pleadings or the pre-trial order are the individual defendants alleged to have engaged in any activities which would not subject the defendant unions to liability nor are the individual defendants alleged to have engaged in any activities which the defendant does not claim are covered by the Taft-Hartley Act since it is admitted that it is only by virtue of the Taft-Hartley Act that unions could be made subject to suit in an action of this kind.

Appellee submits that this is not a case in which the appellant has sued the unions under one theory and the individual defendants under another theory. In each count of the amended complaint it is apparent that the defendant is relying upon the Labor Management Relations Act standards. The situation might be somewhat different if the allegations against the individuals were with respect to conduct which was not within the purview of the Act such as, for example, if it had been alleged as a separate allegation against the individuals that certain individuals did certain specific damage which constituted an unlawful trespass on appellant's property, but appellant has limited itself to a claim for damages against the individuals as a group by virtue of the standards contained in the Taft-Hartley Act, which gives it the right to sue the labor organizations against which it recovered judgment.

An attempt to find a case in which individuals have been joined with labor organizations involving a suit for

damages under the Act has been unsuccessful and this is indeed a novel case. However, the principles which have been set forth with respect to the construction and interpretation of the Act since its passage indicate perhaps why there is such a complete dearth of such actions. Perhaps the closest case in point is that of *Direct Transit Lines v. Local 406, et al.,* decided February 5, 1952, in the U. S. District Court of Michigan, 52 A.L.C. 233. In that case plaintiff commenced an action in a State Court, and, in its complaint, asked for both injunctive relief and damages against a union for the commission of certain acts which it alleged were unlawful and in violation of certain Statutes of the State of Michigan. The Labor Management Relations Act was not mentioned in the complaint. The defendant removed the case to the Federal Court and the District Judge denied a motion to remand to the State Court in an opinion which has been affirmed by the Court of Appeals of the Sixth Circuit. The Court stated that the allegations contained in the complaint, if true, would constitute a violation of the Taft-Hartley Act and that there was no doubt that the case involved a question affecting interstate commerce. Even though the complaint asked for relief by way of injunction which the District Court was powerless to give, yet the Court decided that it had jurisdiction over the subject matter of the action. In rejecting the contention that state law applied, the Court stated:

> "The fact that the Taft-Hartley Act applies to and prohibits the acts alleged to have been committed, is of itself sufficient to deny the applicability or relevance of state law covering the same act. The Supreme Court of the United States repeatedly held

> that Congress, by its legislation, has pre-empted the field of labor relations herein involved and has closed the door to parallel state action. (Citing cases) I conclude that the complaint sets up a controversy affecting interstate commerce; that the Taft-Hartley Act prohibits the defendant's activities alleged in the complaint; and that the applicability of the Taft-Hartley Act is not affected by the recitation in the complaint that the activities violated Michigan Statutes."

This case, and those cited by it, constitute clear authority for the proposition that where Congress has pre-empted the field, action under the common law or by virtue of the statutes of the state is foreclosed. Since it is apparent that Congress has limited liability for violations of the Taft-Hartley Act to labor organizations, individuals cannot be subjected to liability merely because their conduct may give rights to a common law action or an action based upon a state statute. Particularly is this true where, as here, the appellant has elected to pursue a remedy against individuals for acts which are exactly co-extensive with those for which it attempts to hold the unions liable under the Taft-Hartley Act.

The Congressional Record does not clearly disclose what motivations may have prompted Congress in protecting the individuals which it appears to have done. Some of the debates disclose that many of those who voted for the passage of the Act exhibited a real concern for the rights of the individual worker and were motivated exclusively by desire to restrict the activities of large power combinations.

In discussing the damage provisions of the Act, one commentator has said the following:

> "No provision is made by the Act for either of such suits against individuals. Thus, where the action is founded on the violation of the terms of the Act, no actions may be maintained if the complained conduct is charged to an individual, even though the same misconduct at the hands of the labor organization would give rise to a sustainable action. Nor does the fact that more than one individual participates in the misconduct create liability if such individuals do not constitute a labor organization within the definitions of the Act, notwithstanding that there exists a concert of activity. It is not the elements of concerted action or the number of persons committing the alleged offense that imparts amenability to action, but, rather, it is the determination of whether or not the aggrieved party or parties are a "labor organization" as that term is intended by the Act." Rothenberg on Labor Relations, 1949, page 649.

The doctrine of *Erie R.R. Co. v. Thompkins,* 304 U.S. 64, 82 L. Ed. 1188, does not apply to questions dependent upon the constitution, treaties, or statutes of the United States.

> "When a certain statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, although left by the statute to judicial determination, are nevertheless Federal questions, the exceptions to which are to be derived from the statute and the Federal policy which it has adopted. To the Federal Statute and policy, conflicting state law and policy must yield." 54 Am. Jur. 975, citing *Sola Electric Co. v. Jefferson Electric Co.,* 317 U.S. 173, 87 L. Ed. 165, 63 S. Ct. 172.

V

Appellees would be unfairly prejudiced by the granting of a partial new trial which did not include the other defendants.

The power of this court to order a new trial, as to a part of a case, is not questioned where the circumstances are such as to warrant it. However, the circumstances do not warrant the granting of partial new trial in this case, even if this court does find that there was reversible error in the court below. Each of the cases cited by appellant in its brief, at pages 57 and 58, are cases involving verdicts in favor of the plaintiff, which were sent back by the Appellate Court for re-trial on the question of damages only, where the instructions with respect to damages constituted the only error in the court below.

In *Atkinson v. Dixie Greyhound Lines,* 143 F. 2d 477 (1944), the court below had refused to allow the jury to pass on the question of whether or not punitive damages should be awarded. In sending the case back for a new trial on this question alone, the court said that where there was error on the submission of one portion of the case and the other portions were free from error that a partial new trial might be had as to issues into which error had crept,

> "Whenever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters . . . "

In *Thompson v. Camp,* 167 F. 2d 733, verdict for plaintiff in an F.E.L.A. case was reversed on grounds of an erroneous instruction on damages. The Circuit Court

allowed the case to go back for new trial only with respect to amount of damages. The court says:

> "It is recognized that in exercising this right of limiting the re-trial to a single issue where the other issues have previously been properly submitted and determined by a jury, the Court should proceed with caution, with a careful regard to the rights of both parties and only in those cases wherein it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue . . . " 167 F. 2d at p. 734.

In *Yates v. Dann,* 11 F.R.D. 386, the court cites a number of cases in which the granting of partial new trial has been limited to the question of damages. No case, arising under the Federal Rules even remotely analogous to the instant case, has been found in which a partial new trial has been granted.

The liability of the individuals was closely intertwined with that of the unions by appellant's own choice in bringing an action in which the same allegations were made against both groups. The allegations made by the appellant, with respect to the intentions and activities of all of the parties, are such as to make the individuals and the unions inseparable upon any analysis of the fact situation. The same evidence which is introduced to create liability on the part of the unions tends to impart liability to the individuals, and, conversely, since the individuals are alleged to be agents of the union, their activities affect the liability of the unions.

One authority has stated in accordance with the cases cited by the Appellant, as follows:

> ". . . where the practice permits a partial new trial it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without prejudice." 3 Moore's Federal Practice 3248-9.

See also *Kessans v. Kessans,* 58 Ind. App. 437, 108 N.E. 380, where the court held that in determining whether or not a new trial could be had on a cross-complaint alone and not on an original complaint that the test is whether or not:

> "the evidence necessary to support the issue presented by one pleading must necessarily affect and relate to the issue presented by the other."

in determining whether or not a partial new trial was to be granted.

The best evidence that a new trial as to the individuals alone would be prejudicial to them is the fact that a jury verdict was brought in in their favor, in a case in which the activities of the union officials materially affecting the dispute, was presented. Obviously, then, it is ridiculous for the appellant to say that the absence of evidence of the activities of the unions would not be prejudicial. The jury might well have found and on a re-trial, if one should be granted, might well find that the individuals acted spontaneously without any concert of action or conspiracy, but at the instigation of officials of the union, who engineered and planned the conditions which resulted in appellant's damage. To say this is not to admit that this is actually the case, but is merely to point out the probable importance of the activities of the union

officials in the jury's determination either as to the concert of action, which the jury might find to have existed or as to the liability of each individual for damages, which the jury might find to have been caused by the alleged agents of the union, acting in an official capacity and assess against the union. It does not lie in appellant's mouth to say that a case could have been brought against the individuals alone, in view of its choice to proceed in the way in which it has done, obviously under the impression that the bringing in of the assault and battery cases and evidence of violence on the part of the individuals would lead to a better result for it against both the unions and the individuals.

As has been previously shown, the attempt to separate the individuals from the unions, insofar as the findings on damages were concerned, was made by the attorneys for the individuals rather than the appellant.

CONCLUSION

No realistic appraisal of the outcome of the trial in the court below can leave out of consideration the natural reaction of an American jury to the choice presented to it by the appellant.

The individuals could not and should not be held liable for the total damages which are alleged to have resulted from the conspiracy of which they could not have been an integral part. The choice presented to the jury by appellant was either to hold that each individual played such a part or to free him entirely, and, in choos-

ing the latter course, the jury affirmed the principles of individual responsibility which have been paramount in all humane societies.

Respectfully submitted,

PETERSON & POZZI
FRANK H. POZZI
SIDNEY I. LEZAK

Attorneys for Appellees